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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 17

WILLIAM C. ATWATER & COMPANY, INCORPORATED

Appellant

against

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR APPELLANT

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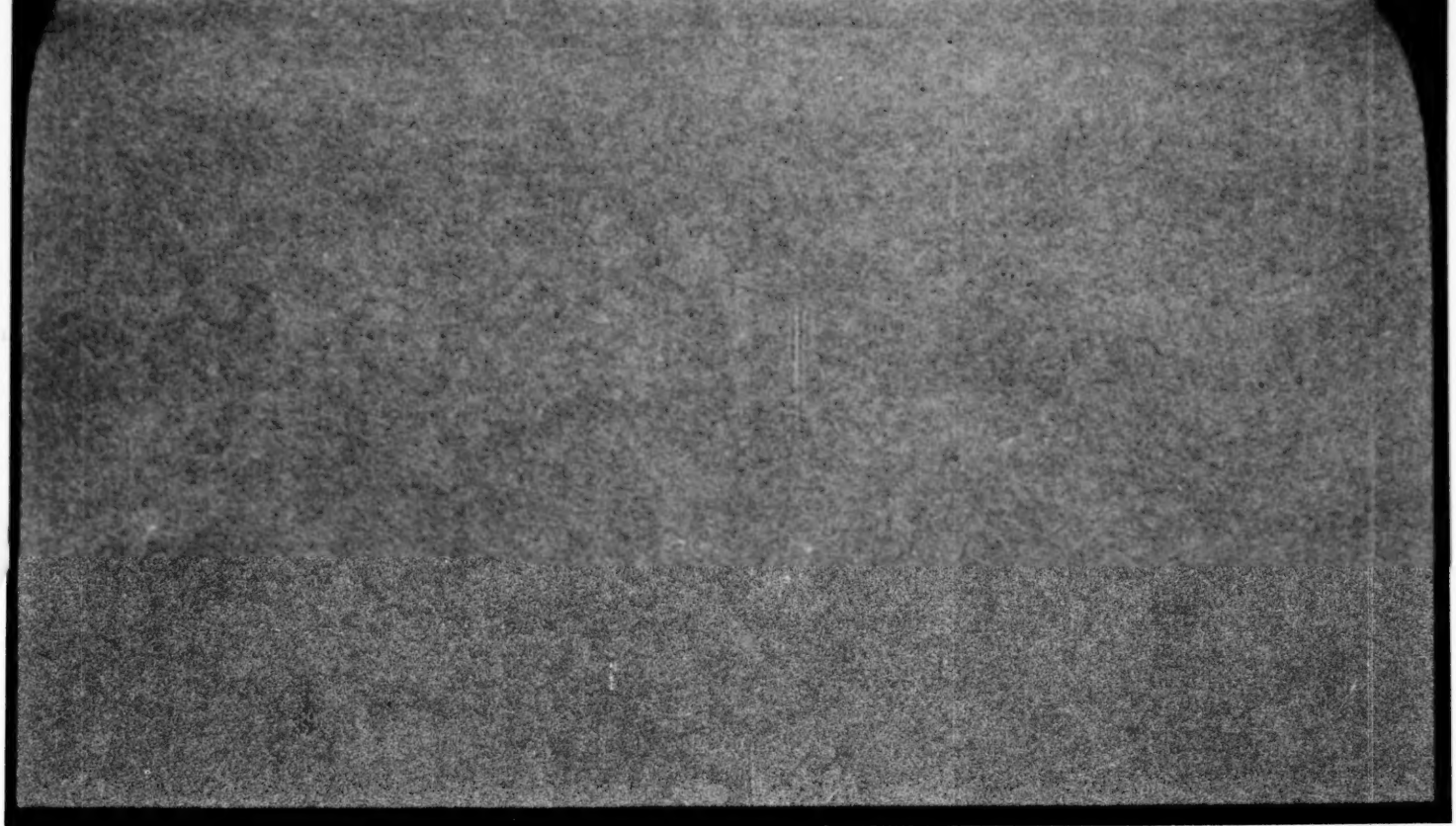

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The opinion of the Court below was officially reported in 60 C. Cls. 323.

Statement of grounds upon which jurisdiction of this Court is invoked.

This is an appeal from a judgment of the Court of Claims entered on the 9th day of February, 1925 (R., 13), which sustained the defendant's demurrer to the plaintiff's petition, as amended, and dismissed said petition. On April 10th, 1925, the plaintiff filed a motion for a new trial (R., 13) which motion, by order dated May 4th, 1925, was overruled (R., 13). On May 7th, 1925, the plain-

tiff made application for and gave notice of an appeal to this Court (R., 13). On May 11th, 1925, said application for appeal to this Court was allowed by the Court of Claims.

Jurisdiction of this Court is invoked by virtue of the provisions of former Sections 242 and 243 of the Judicial Code.

Statement of the Case.

Since this case comes before the Court on an appeal from a judgment sustaining a demurrer, it is only the facts alleged in the amended petition which are important.

Hence, the issue is a very narrow one, depending on rules of pleading rather than on the merits of the case.

To the pleading, it is submitted that the Court should apply a liberal construction in its favor and not a strict construction against it.

The amended petition (R., 1-11) speaks for itself. The allegations thereof, however, may be condensed as follows:

The claimant herein is a corporation organized under the laws of the State of New York engaged in the business of shipping Pocahontas smokeless coal and coke (R., 1).

In the month of June, 1917, an unincorporated association of shippers of bituminous coal to the Tidewater Ports of Hampton Roads, Baltimore, Philadelphia and New York, was organized and known as the Tidewater Coal Exchange, the general purpose of which association was to expedite the transshipment of coal, and rules were adopted for the management and operation thereof (R., 1), a true copy whereof is annexed to the amended petition marked "Exhibit B" (R., 7-11).

On or about the 6th day of November, 1917, the United States Fuel Administrator, acting under authority of an Executive Order of the President made in pursuance of the Act of Congress dated August 10th, 1917 (40 Stat. 276), issued an order, a true copy whereof is annexed to the petition marked "Exhibit A" (R., 4-7), under the terms of which order, the rules of the Tidewater Coal Exchange were adopted and approved, and the Commissioner of said Tidewater Coal Exchange was appointed the representative of said Fuel Administrator to carry out the provisions thereof (R., 2, 6).

Said order provided that every shipper of bituminous coal for transshipment at the ports above mentioned was required to consign all shipments to said Tidewater Coal Exchange in accordance with and subject to the provisions of the existing Tidewater Coal Exchange rules, with the same rights and liabilities respecting such shipments and the transshipment and delivery of the coal included therein as then applied to members of said Exchange (R., 5, 6), and said order further provided that no changes or additions should be made in said rules, without the approval of said Fuel Administrator (R., 2, 6).

The amended petition then alleges that under and by virtue of the terms of said order and the rules of the Tidewater Coal Exchange, defendant, acting through the United States Fuel Administrator, its duly authorized representative, represented and agreed that any and all coal shipped by any shipper of coal subject to said order should be credited to said shipper in accordance with the rules of the Tidewater Coal Exchange aforesaid, and with the custom and usage at all the times when said rules were in force (R., 2).

Claimant then avers that it shipped coal in accordance

with the terms of said order and rules, but that as to shipments made by the claimant between the dates of November 11th, 1917, and December 5th, 1918, "the defendant [United States], acting through said Fuel Administrator, its duly authorized representative, withheld from and failed to credit to the claimant" 34,143 net tons of coal, and did not credit the same to claimant until December 5th, 1918, on which date the claimant's coal credits were increased 34,143 net tons (R., 3).

Claimant then avers the market price of said coal during the period when it would have been entitled to credit under said rules as aforesaid, and the best prices obtainable by claimant on a sale thereof after said coal was credited to claimant on December 5th, 1918, when there was no market for most of said coal (R., 3, 4).

Claimant then claims damages or compensation based on the differences in said prices, in the sum of $50,000 with interest from the 5th day of December, 1918 (R., 4).

The rules of the Exchange show that coal was classified and shipped to pools (R., 7), from which a shipper was entitled to draw an amount of coal equivalent to that shipped by him, upon receiving credit for his shipments in the Exchange accounts (R., 8).

The facts aforesaid are alleged in two causes of action, the first cause of action being stated as founded upon the Fifth Amendment to the Constitution of the United States, the second cause of action being stated as founded upon an implied contract, jurisdiction of both being vested in the Court of Claims under the provisions of the Judicial Code, Section 145.

The defendant demurred upon the ground that the facts alleged in said amended petition did not constitute a cause of action against the United States within the juris-

diction of the Court of Claims (R., 11), and the demurrer was sustained upon the ground that said facts did not constitute a cause of action against the United States within the jurisdiction of any Court, *i. e.*, that the facts alleged constituted a *tort* for which the United States was not liable.

Summary of Argument.

No tort is alleged in the amended petition which is founded on authorized and rightful acts of the United States Fuel Administrator.

The question of authority is not before the Court as authority is admitted by the demurrer.

There was none the less a taking because the coal in question is not alleged to have been consumed. Destruction of value is as much a taking as physical appropriation. The power to sell and deliver the coal was a part of that aggregate of rights, privileges, powers and immunities which constituted the claimant's title and of that part it was deprived absolutely.

There was none the less a taking because the United States already had possession when the act of taking occurred.

Here, there are no facts rebutting the implication, as matter of law, of a contract to make compensation.

In the absence of a contract implied in law, a contract implied in fact is alleged in the amended petition.

ARGUMENT.

POINT I.

The Court of Claims erred in holding that this suit is based on a tortious act of an employee of the United States.

As was said by Mr. Justice HARLAN in *Bigby* v. *United States*, 188 U. S. 400, at page 405, "the very essence of a tort is that it is an unlawful act, done in violation of the legal rights of some one."

In its opinion herein on the demurrer, the Court of Claims held (R., 13):

> "In its essence the suit of plaintiff is one to recover damages for the omission, or negligence, of the Tidewater Coal Exchange as a designated agency of the Fuel Administration. The Government is not liable for the torts, misconduct, misfeasances, or laches of its employees (See Bigby case, 188 U. S. 400, 407; Gibbons case, 8 Wall. 269, 274; Hill case, 149 U. S. 593, 598)."

On the contrary, the amended petition is wholly devoid of any allegation supporting this holding.

It is nowhere alleged therein that there was any omission or negligence or laches on the part of any employee of the Government. In fact the opposite is alleged. Said amended petition, Paragraph "Ninth," alleges in part as follows (R., 3, italics ours):

> "That * * * *the defendant*, acting through said United States Fuel Administrator, *its duly authorized representative*, withheld from and failed to credit your claimant with coal shipped by your claimant to said Tidewater Coal Exchange, as afore-

> said, to the amount of 34,143 net tons, which your claimant was ready, able and willing to receive at the time and times when your claimant was entitled to credit therefor under said order, and did not credit your claimant therewith until December 5th, 1918, * * *."

There is no allegation here of any wrongful act by the Fuel Administrator. The allegation is that he was *authorized* to act, that he *rightfully* withheld the coal. Indeed, the allegation goes further than this and states that the *defendant, i. e., The United States,* withheld the coal. The United States could not commit a wrong. The allegation is one of rightful withholding.

There is no allegation that there was any *error* made by the Fuel Administrator. The statement at the end of the statement of facts in the opinion of the Court of Claims on the demurrer herein (R., 12), to the effect that "the error was discovered" finds no justification in the allegations of the amended petition.

The amended petition clearly founds its cause of action upon an authorized act of the United States Fuel Administrator, not upon any tort, misconduct, misfeasance or laches committed by him. There was no assertion by the Fuel Administrator of title to the coal withheld. The Fuel Administrator had the power to withhold claimant's coal. It is alleged that he was authorized to exercise that power, and that he did so rightfully, not wrongfully.

It is submitted that *the allegation of authority* aforesaid is clearly *an allegation of fact* which the Government has *admitted by demurring herein.*

Therefore, although it is conceded that the Government is not liable for the torts, misconduct, misfeasances or laches of its employees, there were none such alleged in the case at bar.

POINT II.

The amended petition, as a first cause of action, alleges an implied contract by defendant to compensate the claimant for the taking of claimant's property for public use, because of the Fifth Amendment to the Constitution of the United States.

It will, of course, be conceded that where the Government takes property of a citizen for public use without any claim of ownership to it in itself, it impliedly promises to make just compensation therefor.

In order that a contract to make compensation be implied, there are the following requisites:

(1) Private property, title to which is recognized to be in an individual; (2) the taking thereof for public use; (3) by someone purporting to act for the United States; (4) authorized (a) himself directly or (b) by someone who is so authorized (c) to take specific property, or (d) to do an act necessarily involving such taking.

> *United States* v. *North American, etc., Co.*, 253 U. S. 330;
> *United States* v. *Lynah*, 188 U. S. 445;
> *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645.

"Private property" within the above rule does not necessarily mean corporeal, physical property. Patents are property within the rule and the right to make use of patent rights is also within the rule.

United States v. *Palmer*, 128 U. S. 269, was an action in the Court of Claims for the value of the use of a patent with the consent of the owner. Here there was a partial

use only of intangible property. The claimant still owned the patent despite its use by the United States and could license other people to use it. It was held that the claimant was entitled to recover upon an implied contract.

In the case at bar, the physical property involved was the coal which had been shipped to the Tidewater Coal Exchange, a Federal agency under the rules of the United States Fuel Administrator, *but the coal itself was not "taken"* by consuming the same. An equivalent amount of coal from the pools was returned to the claimant. What was taken was the *power to dispose* of the coal by sale and delivery from the time when it reached the Tidewater Coal Exchange and possession of it was acquired by the United States, until credit therefor was given to the claimant on December 5th, 1918.

It appears from the amended petition that title to the coal was always recognized by the Government to be in the claimant. The coal was shipped under the order of the Fuel Administrator and the rules of the Tidewater Coal Exchange which provided for the pooling of the *shipper's coal* (R., 7). It does not appear in the amended petition that any claim was ever made by the United States that it owned the coal, and the fact that the coal was eventually credited and its equivalent re-delivered to the claimant, was a recognition of its ownership by the claimant.

In order to constitute a "taking," it is not necessary that complete title to the physical property involved should be appropriated by the United States.

In *United States* v. *Russell*, 13 Wall. 623, the United States under a military emergency took into its service certain already officered and manned steamers of the claimant. The Court found that there was no intent to

"appropriate" them, but only to compel performance of the services needed and to use the same and to pay a reasonable sum therefor, and such was the claimant's understanding, and further that the property was returned to the exclusive control and possession of its owner as soon as the emergency was over. The Court held this to be no "appropriation" within the terms of an act divesting jurisdiction of the Court of Claims in such event (Act of Congress, July 4, 1864, 13 Stat. 381), and further held that the United States was liable on an implied promise to pay for the use of the boats and that the remedy of the claimant had been properly prosecuted in the Court of Claims, the Court saying that the Government may seize private property in time of war if the emergency is great, but is obligated on an implied contract to pay compensation therefor.

The above case is particularly pertinent to the situation in the case at bar. *There, also, the seizure was made under the war power. There was no taking of the steamers themselves but only of the use thereof, and it was held that the United States was under an implied obligation to make compensation therefor.*

In the case at bar, of course, there is no allegation that the United States "used" the coal. What the Government took was the *right, privilege and power to dispose of the coal* by retaining possession thereof after the claimant was entitled thereto under the Exchange rules, thus preventing a sale and delivery of the same. This is only an apparent difference between the cases and a consideration of the difference in the character of the property involved will show that it is not a basis for distinguishing them. In *United States* v. *Russell, supra,* the claimant was engaged, *not* in *selling* steamers but in *using* them.

He was in the business of navigation and consequently when his steamers were commandeered, compensation for the *use* of them placed him in the same position as he would have been in, had the ships not been commandeered. In the instant case, however, the claimant was in the business of *selling* coal. The coal was marketable property, intended to be sold and the *power to dispose* of the coal was very important, due to the fact that prices normally fluctuated, as they actually did in the case at bar; and consequently when the claimant was deprived of the possession of the coal and the attendant power to sell and deliver the coal, it was deprived of a very substantial property right, and the only way to put the claimant in the position in which it would have been if it had had the power to dispose of the coal, is to pay it the value of that power of disposition, which is sought in this action, namely, the difference between the prices which it would have obtained, if it had had the power to dispose of the coal, and the price which it actually obtained when the coal was finally put at its disposal.

The contention that in order to constitute a "taking" there must be an appropriation of the full legal title to the physical property involved, was finally disposed of in the case of *United States* v. *Cress*, 243 U. S. 316. In that case, the United States built a lock and dam in the Cumberland River which permanently caused periodical overflows which substantially injured, but did not totally destroy, the value of the land of Cress. A like improvement in the Kentucky River raised the water in a tributary in which one Kelly owned a mill and permanently ended the usefulness of the mill by destroying the head of water necessary to run it. It was held that both acts constituted a taking; that the power of the Government

to regulate commerce must be exercised subject to the restrictions of the Fifth Amendment to the Constitution if private property was taken in the exercise thereof; that it was immaterial that all the interest in the plaintiffs' land was not taken; that the plaintiffs were entitled to compensation to the extent of the injury suffered, even though the fee still remained in them; that when Cress was paid, the United States would have an easement of overflow upon his land, for which the payment would be compensation, and that Kelly would recover the amount of the depreciation in value of his property due to the loss of water power. In this case Cress also had a private way and ford appurtenant to his land, and it was held that damage to the land by reason of the destruction to the ford was also properly allowed. The Court said at pages 327 and 328:

> "That overflowing lands by permanent backwater is a direct invasion, amounting to a taking is settled by *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, 177; *United States* v. *Lynah*, 188 U. S. 445, 478-480. It is true that in the *Pumpelly Case* there was an almost complete destruction, and in the *Lynah Case* a complete destruction, of the value of the lands, while in the present case, the value is impaired to the extent of only one-half. But it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether there is a taking * * * There is no difference of kind, but only of degree, between a permanent condition of continual overflow by backwater and a permanent liability to intermittent but inevitably recurring overflows; and on principle, the right to compensation must arise in the one case as in the other. If any substantial enjoyment of the land

> still remains to the owner, it may be treated as a partial instead of a total divesting of his property in the land. The taking by condemnation of an interest less than the fee is familiar in the law of eminent domain."

In the case at bar, likewise, it is clear that there was a sufficient "taking" even though the whole right of property of the claimant in the coal was not appropriated. The possession of the coal and the attendant power to dispose of the coal were part and parcel of that aggregate of rights, privileges, powers and immunities respecting the coal which constituted the claimant's title, and it was that part of which it was deprived. In the case at bar, the damage is clearly substantial. The actual loss to the claimant due to the deprivation of its power to sell and deliver its coal was $50,000, as is alleged in the amended petition (R., 4).

Furthermore, the fact that there is no allegation that the United States consumed the coal, does not make its action any the less a "taking."

In *United States* v. *Lynah*, 188 U. S. 445, the plaintiff owned land along the Savannah River. The United States built a dam which flooded the plaintiff's land necessarily and destroyed its value. There was no physical taking by the United States. It was said, at page 469, that destruction of value is a taking without any physical possession or conversion of the lands, and the Court cited *Pumpelly* v. *Green Bay Company*, 13 Wall. 166 and quoted from that case, page 177:

> "The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable

stream as the government had a right to for the improvement of its navigation.

"It would be a curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can in effect subject it to total destruction without making any compensation, because, in the narrowest sense of the word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for the invasion of private right under the pretext of the public good which had no warrant in the law or practices of our ancestors."

and after reviewing various authorities the Court continued at page 470:

"It is clear from these authorities that where the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the Fifth Amendment. While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee is vested."

and at page 471:

> "But if any one proposition can be considered as settled by the decisions of this Court, it is that although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

In the case at bar there was no physical consumption of the coal by the United States *but there was lawful possession of it by the United States throughout the entire period for which compensation is claimed, which took away its value to the extent of the compensation sought in this action.* The coal was shipped by claimant to the Tidewater Coal Exchange, a federal agency controlled by a representative of the United States Fuel Administrator, under the order of said Fuel Administrator, and thereby came into the possession and custody of the United States. But the order itself did not constitute a "taking" nor did the shipment thereunder, for the order *did not require* the claimant to ship any coal but provided only that if coal were shipped, it should be consigned to the Tidewater Coal Exchange. The acquiring of possession by the United States did not constitute a "taking." It was agreed that possession be taken to facilitate transshipment. It was the retention of possession after the time when the rules of the Tidewater Coal Exchange, under which the claimant had shipped the coal, entitled the claimant to credit therefor, without crediting the same, which constituted the "taking."

It is in this fact that the instant case differs from the cases of *Pine Hill Coal Co.* v. *United States*, 259 U. S. 191, 55 C. Cls. 433, and *Morrisdale Coal Co.* v. *United States*, 259 U. S. 188, 55 C. Cls. 310. In those cases, pursuant to

regulations under Section 25 of the Lever Act (40 Stat. 284) authorizing the fixing of coal prices and the regulation and distribution of coal, the claimant's coal was sold by it to private buyers at a price fixed by the Government which was less than the claimant had previously contracted to sell it for to others. It was held that this constituted no taking and no contract was implied to indemnify the claimant for loss, the Supreme Court saying at page 190 of the *Morrisdale* case:

> "Making the rule was not a taking and no law-making power promises by implication to make good losses that may be incurred by obedience to its commands. * * *
>
> "If the law requires the doing of an act which is unconstitutional, the remedy is to refuse to obey it, not to sue the law maker."

In other words, in those cases the claimant sought to recover compensation for losses which it suffered when it voluntarily obeyed an order of the United States Fuel Administrator and sold coal not to the United States but to other private persons. In the case at bar, however, there is no claim that the making of the order requiring shipment to the Tidewater Coal Exchange was a taking. *The order did not require any shipment but only ordered that if any shipments were made, they should be made to the Tidewater Coal Exchange.* Moreover, when shipments had been made and custody and possession of the coal was taken by the United States Fuel Administrator in charge of the Tidewater Coal Exchange, said taking was rightful and there was clearly no intent on the part of the Government to pay, or the claimant to receive, compensation by reason thereof, so long as credit for the same was given in accordance with the rules. The claim-

ant, therefore, in the instant case does not seek compensation because it was required to consign to the Tidewater Coal Exchange all coal which it shipped, nor because it obeyed the order, and shipped coal to said Exchange. Claimant does seek compensation by virtue of the fact that under said order and rules, claimant was entitled to credit for an equivalent amount of coal and to delivery of the same, upon arrival at the Tidewater Coal Exchange of coal shipped by claimant, and that this credit was rightfully withheld. In other words, it was understood that the Government should take possession of the coal for the purpose of passing it through the Tidewater Coal Exchange without paying compensation, *but it was never understood that the Government should retain possession beyond the time when the claimant was entitled thereto under the Tidewater Coal Exchange Rules without paying compensation therefor.*

Since the sovereign can do no wrong, the Government is incapable of taking property for private use. Hence, an allegation of an act amounting to a "taking" by the Government, is equivalent to an allegation of a taking for public use under a fair construction of the pleading.

That the taking aforesaid was done by an officer of the United States, namely, the United States Fuel Administrator, is, of course, undisputed. *When consideration is given to the very broad war powers vested in the President and his agents, such as the Fuel Administrator, it cannot be said that the act of the Fuel Administrator was not authorized, and could not be shown by any proof to have been authorized.*

Section 1 of the Lever Act, 40 Stat. 276, provides as follows:

"Authority conferred; rules and regulations.—

That by reason of the existence of a state of war, it is essential to the national security and defense, for the successful prosecution of the war, and for the support and maintenance of the Army and Navy, to assure an adequate supply and equitable distribution, and to facilitate the movement, of foods, feeds, fuel including fuel oil and natural gas, and fertilizer and fertilizer ingredients, tools, utensils, implements, machinery, and equipment required for the actual production of foods, feeds, and fuel, hereafter in this Act called necessaries; to prevent, locally or generally, scarcity, monopolization, hoarding, injurious speculation, manipulations, and private controls, affecting such supply, distribution, and movement; and to establish and maintain governmental control of such necessaries during the war. For such purposes the instrumentalities, means, methods, powers, authorities, duties, obligations, and prohibitions hereinafter set forth are created, established, conferred, and prescribed. The President is authorized to make such regulations and to issue such orders as are essential, effectively to carry out the provisions of this Act."

Section 2 of the Lever Act, 40 Stat. 276, provides as follows:

"The use of agencies and services of persons without compensation—In carrying out the purposes of this Act the President is authorized to enter into any voluntary arrangements or agreements, to create and use any agency or agencies, to accept the services of any person without compensation, to cooperate with any agency or persons, to utilize any department or agency of the Government, and to coordinate their activities so as to avoid any preventable loss or duplication of effort or funds."

Section 25 of said Act, 40 Stat. 284, provides in part as follows:

> "Coal and coke; fixing prices; regulation of production and sale—The President of the United States shall be, and he is hereby, authorized and empowered, whenever and wherever in his judgment necessary for the efficient prosecution of the war, to fix the price of coal and coke, wherever and whenever sold, either by producer or dealer, to establish rules for the regulation of and to regulate the method of production, sale, shipment, distribution, apportionment, or storage thereof among dealers and consumers, domestic or foreign; said authority and power may be exercised by him in each case through the agency of the Federal Trade Commission during the war or for such part of said time as in his judgment may be necessary."

As was said by Mr. Chief Justice CAMPBELL in *Pine Hill Coal Company* v. *United States*, 55 C. Cls. 433, at page 442, although the Lever Act provides for the agency of the Federal Trade Commission, yet the fact was that the President did not, and was not required by said Act to adopt this agency, *and the fact was that the agency adopted was the Fuel Administration.*

Under Section 10 of the Lever Act, 40 Stat. 279, the President was authorized to requisition fuels for the support of the Army or the maintenance of the Navy. It is submitted that the Fuel Administrator, even though he did not make such requisition, had the right to handle coal so that he would at all times have sufficient coal on hand at the Tidewater Coal Exchange subject to requisition for the Army or Navy in case of need. The power to requisition at the great tidewater shipping and coaling ports of Hampton Roads where claimant's coal was

shipped, was badly crippled unless there was power to keep coal on hand subject to requisition.

In time of war, there must have been thousands of other situations in which this act of the Fuel Administrator would have been within his powers.

It is submitted that this Court should not hold, as matter of law, that he was not authorized in this case without taking proof upon this question.

Further than this, it is submitted that on this demurrer, the question of authority is not properly before the Court, inasmuch as it is alleged as a fact in Paragraph "Ninth" of the amended petition that the United States acted through the Fuel Administrator and that the Fuel Administrator had authority (R., 3) *and this allegation of fact is admitted by the demurrer.*

In the opinion of the learned Chief Justice of the Court of Claims, it was said (R., 13):

> "While it is to be conceded that where the Government takes property of the citizen for public use without any claim of ownership or right to it in itself it impliedly promises to make just compensation therefor (*Great Falls Mfg. Co. case,* 112 U. S. 645; *North American Co. case,* 253 U. S. 330, 335), the circumstances may be such as to clearly rebut the existence of an implied contract. *Horstmann & Co. case,* 257 U. S. 138, 146; *Klebe case,* 263 U. S. 188, 191."

The above statement of the law is undoubtedly correct, but it is submitted that the case at bar is not within the principle of the two cases last above cited.

In *Horstmann Co.* v. *United States,* 257 U. S. 138, the plaintiffs were owners of lands surrounding lakes which were the source of soda supply. The Government carried

out an irrigation project which caused the lakes to rise 19 feet, destroying the value of the plaintiffs' properties. *It was found as a fact that no human knowledge could have predicted the result which occurred* and the Court held that this fact rebutted any implication of a contract by the United States and that any other result would deter the Government from useful enterprises from fear of immeasurable and unforeseen liability; but the principle that there might be a taking for public use without physical user or material benefit was recognized; in other words, that a diminishing of value was as much a taking as a physical possession.

In the above case, therefore, since no human knowledge could have predicted that there would have been a taking, it was obvious to the Court that no contract by the Government could be implied, but this is not authority for denying the implication of a contract in the case at bar where there was an actual and intentional physical taking of possession of the property in question, which everyone knows is of marketable kind and subject to price fluctuation.

In *Klebe* v. *United States*, 263 U. S. 188, a steam shovel was taken by an officer of the United States *claiming the right thereto under a conditional sales contract with a third person.* It was held that the right to sue in the Court of Claims was not founded on the Fifth Amendment to the Constitution but on an implied contract; that circumstances might be such as to rebut the existence of such a contract and that such was the case there where possession was taken under an asserted claim by the United States of a right to take by virtue of an express contract. It was contended that the Government's claim of right was not well founded but the Court held that

to be immaterial, saying that if the Government's claim was unfounded, the plaintiff's right was violated but his claim sounded in tort and was not within the jurisdiction conferred by the Tucker Act and hence that to decide that the Government was wrong in regard to the right to take under the express contract would not help the plaintiff any. This case, however, plainly differs from the case at bar, where the Government never made any claim to title to the claimant's coal but recognized its ownership and returned an equivalent amount of coal to it.

POINT III.

The amended petition, as a second cause of action, alleges a contract implied in fact by the United States to credit and redeliver to the claimant all coal shipped by it under the terms of the order of the United States Fuel Administrator, dated November 6th, 1927.

In considering this point it is desired to bear in mind the distinction between contracts implied in *fact* and contracts implied in *law*. As was said by Mr. Justice CAMPBELL in *Klebe* v. *United States*, 57 C. Cls. 160, 173:

> "The property was taken possession of because the Government officer asserted that an express contract gave it the right to purchase by paying the difference between what it had paid as rental, $4,225, and the stated valuation, $5,000. To claim that by the very act of exercising this asserted right, to purchase for $775 the Government made itself liable, upon an implied contract, to pay $5,000 involves a contradiction of terms. It ignores any distinction between express and implied agreements and *confuses that class of contracts which*

grow out of the dealings of the parties with the distinct class of implied contracts arising from the exercise of the sovereign right of eminent domain because of the fifth amendment.'"

In arguing this point, the claimant does not wish to consider that class of implied contracts arising from the exercise of the Government's right to take property or contracts implied in law, but is speaking only of contracts in the ordinary sense of the term, either express or implied in fact.

The factual contract relied upon by the claimant arises in brief as follows:

The Fuel Administrator issued an order dated November 6th, 1917. This order was issued in pursuance of the Act of Congress, August 10, 1917 (40 Stat. 276), known as the Lever Act. Section 25 of said Act, *supra, authorized the President to make said order,* and Section 2 of said Act, *supra, authorized the President to make contracts* for the purpose of carrying out the terms of said Act. Said order (R., 5, 6, 7) provided that all shipments of coal to Tidewater, made by any shipper of bituminous coal, should be shipped to the Tidewater Coal Exchange, theretofore an unincorporated association formed to facilitate the transshipment of coal at Tidewater, and thereby designated a federal agency for the purpose of carrying out said order, and further provided that said shipments should be made in accordance with the rules of the Tidewater Coal Exchange then in effect. Under said rules, and the custom and usage then in effect, the Tidewater Coal Exchange was obligated to credit shipments of coal to the owners thereof immediately upon their arrival at the Exchange, and no shipper was entitled to withdraw his coal until it had been so credited to him by the Exchange (R., 2, 7, 8). *But said order did not require any shipments to be made.*

By said order, then, the United States in effect made an offer to the claimant that if claimant would ship coal in accordance therewith to the federal agency known as the Tidewater Coal Exchange, said federal agency would credit to the claimant all coal so shipped, in accordance with the Exchange Rules aforesaid. This offer was accepted by the claimant when it shipped coal, and each shipment constituted a contract by the United States with the claimant to redeliver said coal or to credit the same, which was equivalent to redelivery, for the shipper was not entitled to delivery until credit had been given, in accordance with the Exchange Rules. The coal referred to in the amended petition herein was shipped but credit was not given to the claimant, without which claimant was not entitled to redelivery.

If there was a contract to credit and redeliver, it is immaterial why said credit was not given and redelivery not made to the claimant, whether because of error or negligence or rightful or wrongful act on the part of the Fuel Administrator or other officer of the United States. *The reason for failure to act in accordance with a duty imposed by contract is immaterial. The failure constitutes a breach of contract.* No citation of authority is necessary in support of so elementary a proposition.

The measure of damages is the same as the measure of damages for delayed delivery in the ordinary contract, namely, the difference between the market price at the time when the credit or redelivery should have been made, and the market price at the time when the credit or redelivery actually was made.

POINT IV.

The judgment herein should be reversed and the demurrer heretofore filed herein should be overruled.

There is nothing inconsistent in the causes of action alleged in the amended petition herein and considered respectively in the preceding points. The first cause of action discussed in Point II is founded upon an implied contract by the United States to pay to the claimant the value of the plaintiff's property taken for public use. The second cause of action discussed in Point III is founded upon a factual contract between the United States and the claimant under the terms whereof the United States agreed to credit and redeliver to the claimant in accordance with the rules of the Tidewater Coal Exchange all coal shipped by the claimant to said Exchange. In other words, the second cause of action is based on a breach of contract, and the first cause of action upon a taking of property. There was no less a taking of the plaintiff's property because the taker already had possession of it and was obligated on a contract to redeliver that property, nor was there any less a breach of contract because the act causing that breach also constituted a taking.

It is submitted that the Court should not be astute to dispose of a case on the pleadings where, as here, the Statute of Limitations would have run against claimant and it would be left remediless without ever having had an adjudication on the merits.

Respectfully submitted,

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